

**PNEU Electric, Inc./Nan Ya Plastics Corporation,
America and International Brotherhood of Elec-
trical Workers, Local Union No. 995, AFL-CIO.**
Case 15-CA-14050

September 29, 2000

DECISION AND ORDER

**BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN**

On February 9, 1998, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel filed cross-exceptions and a supporting brief, and Respondent PNEU Electric, Inc. filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Orders as modified.

We adopt the judge's finding that the Respondents discharged, and caused the discharge, of employees Clifford Zylks and Andras Aycock because of their union organizational activities, in violation of Section 8(a)(3) and (1). The judge found in this regard that Respondent Nan Ya's safety manager and contract coordinator, Paul Bergeron, directed that Zylks and Aycock not organize "on the site" and found that this statement independently violated Section 8(a)(1). The judge found that PNEU employees customarily talked about nonwork matters while working on the Nan Ya jobsite. Further, Respondent Nan Ya's no-solicitation rule did not restrict employee conversations while working and, according to Bergeron, conversations among employees about a union would be permissible if work was not interrupted and the conversations were approved by management. Respon-

dent PNEU had no specific rules regarding solicitation. While it did expect employees to be working when on worktime, the judge credited the testimony of Zylks and Aycock that they did not stop their own work while talking about the Union nor did they interfere with the work of other employees.

In these circumstances, and particularly in light of the credited testimony of Zylks and Aycock, it is evident that their discharges were not attributable to valid work-related restrictions pertaining to interference with work. Thus, there was no interference with work on their part, and the Respondents' rules or policies pertained only to such interference. Accordingly, it follows that the focus of their discharges was, as the judge found, the content of their conversations—the Union—and their union solicitation of other employees. We therefore adopt the judge's finding that Zylks and Aycock were unlawfully discharged because of their union activities.

We also agree with the judge that Respondent PNEU violated Section 8(a)(3) and (1) by failing to consider for employment applicants Kendrick Russell, Donald Longuepee, and Roland Goetzman when they sought to apply for work on June 25, 1996.²

On June 24, Respondent PNEU's field manager, Freddie Zeringue, informed applicant Russell Anderson that PNEU needed electricians at the Nan Ya jobsite. On June 25, Anderson, whose union affiliation was unknown, appeared at the jobsite and was given an application. Also on June 25, applicants Russell, Longuepee, and Goetzman appeared at the Nan Ya jobsite. All three wore union organizer buttons. Contrary to what he had told Anderson that same day, Zeringue told Russell, Longuepee, and Goetzman that he was cutting back at the jobsite and that no applications were available. Respondent's normal policy was to take applications even when jobs were not available and to retain those applications for 1 year.

In *FES*, 331 NLRB No. 20, slip op. at 7 (2000), the Board recently set forth the appropriate framework for analysis of a refusal-to-consider allegation, as follows:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

¹ Respondent PNEU Electric, Inc. (PNEU) has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently stated that Respondent Nan Ya violated Sec. 8(a)(3) and (1) by telling employees that they could not engage in union organizational activities at the Nan Ya site. As the judge found in his conclusions of law, this conduct violated Sec. 8(a)(1) and was so alleged in the complaint.

For the reasons set forth by the judge, we find that Foremen Tim Benoit and Mark Miller were agents of Respondent PNEU, and we therefore find it unnecessary to pass on whether they were statutory supervisors.

² All dates are in 1996 unless noted otherwise.

Here, as the judge found, applicants Russell, Longuepee, and Goetzman were affirmatively misled about the availability of applications. Respondent PNEU's departure from its normal practice of taking applications was a meaningful act because it excluded the three applicants from the process by which employees are considered for job opportunities with Respondent PNEU. We agree with the judge that the disparate treatment of Anderson, whose union affiliation was unknown, and the three applicants wearing union organizer buttons warrants the inference that Respondent PNEU's refusal to consider the union applicants for employment was motivated by their union affiliation. Further, Respondent PNEU failed to show that it would not have considered them even in the absence of their union affiliation.³ Accordingly, we find that Respondent PNEU violated Section 8(a)(3) and (1) by failing to consider applicants Russell, Longuepee, and Goetzman.⁴

ORDER

The National Labor Relations Board adopts the recommended orders of the administrative law judge as modified below and orders that

A. Respondent PNEU Electric, Inc., Lafayette, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Clifford Zylks and Andras Aycok, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the following for paragraph 2(d), insert paragraphs 2(e) and (f), and reletter the subsequent paragraphs.

"(d) Consider Kendrick Russell, Donald Longuepee, and Roland Goetzman for future job openings in accord with nondiscriminatory criteria, and notify the Charging Party, International Brotherhood of Electrical Workers, Local No. 995, AFL-CIO, and the Regional Director for Region 15 of future openings in positions for which the discriminatees applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that Respondent PNEU, but for the failure to consider Russell, Longuepee, and Goetzman on June 25,

1996, would have selected any of them for any job openings arising after the beginning of the hearing on September 22, 1997, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, Respondent PNEU shall hire them for any such position and make them whole for any losses, in the manner set forth in the remedy section of this Decision and Order, as modified.

"(e) Within 14 days from the date of this Order, notify Kendrick Russell, Donald Longuepee, and Roland Goetzman in writing that any future job application will be considered in a nondiscriminatory way.

"(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for employment Kendrick Russell, Donald Longuepee, and Roland Goetzman, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way."

3. Substitute the attached notice (App. A) for that of the administrative law judge.

B. Respondent Nan Ya Plastics Corporation, Bathelor, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Clifford Zylks and Andras Aycok, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice (App. B) for that of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

³ Respondent PNEU contends that there can be no unlawful refusal to consider in the absence of available jobs for the applicants at issue. In *FES*, supra, slip op. at 8, we considered, and rejected, this contention.

⁴ We shall modify the judge's recommended Order and notice to comport with *FES*, supra, and *Indian Hills Care Center*, 321 NLRB 144 (1996).

WE WILL NOT interrogate employees about the union activities of other employees.

WE WILL NOT threaten employees with loss of benefits or privileges, isolate them or assign them more onerous work or discharge them because of their union activities or in order to discourage them from engaging in union and other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against our employees because of their union activities or in order to discourage employees from engaging in such activities.

WE WILL NOT discriminatorily treat union-affiliated applicants for employment differently from those whose union affiliations are unknown to us or deny them applications or consideration for employment because of their union membership, sympathies, or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Clifford Zylks and Andras Aycock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with Nan Ya Plastics Corporation, make Clifford Zylks and Andras Aycock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Clifford Zylks and Andras Aycock, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL consider Kendrick Russell, Donald Longuepee, and Roland Goetzman for future job openings in accord with nondiscriminatory criteria, and notify them, Charging Party International Brotherhood of Electrical Workers, Local No. 995, AFL-CIO, and the Regional Director for Region 15 of future openings in positions for which they applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, they would have been selected for any other openings, we shall hire them for any such position and make them whole, with interest, for any loss of earnings and benefits.

WE WILL, within 14 days of the Board's Order, notify Kendrick Russell, Donald Longuepee, and Roland Goetzman in writing that any future job application will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment Kendrick Russell, Donald Longuepee, and Roland Goetzman, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

PNEU ELECTRIC, INC.

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they may not engage in union activities on plant premises.

WE WILL NOT discharge or cause the discharge of employees because of their union activities or in order to discourage them from engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, inform Pneu Electric, Inc., with copies to Clifford Zylks and Andras Aycock, that we have no objection to Pneu Electric's employing Clifford Zylks and Andras Aycock to work on our projects.

WE WILL, jointly and severally with Pneu Electric, make Clifford Zylks and Andras Aycock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Clifford Zylks and Andras Aycock, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

NAN YA PLASTICS CORPORATION, AMERICA

Andrea J. Goetze, Esq., for the General Counsel.
Charles Hollis, Esq. and Sam Zurik, Esq. (The Kullman Firm),
 for Respondent Pneu Electric, Inc.
*Gordon A. Pugh, Esq. and Juliet T. Rizzo, Esq. (Breazeale,
 Sachse & Wilson, LLP)*, for Respondent Nan Ya.
K. E. Russell, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. This case was heard by me in Baton Rouge, Louisiana, on September 22–24, 1997. The charge initiating the complaint was filed by International Brotherhood of Electrical Workers, Local Union No. 995, AFL–CIO (the Union) and served on each Respondent on September 10, 1996¹ and the complaint issued on December 30. The complaint alleges, and the Respondents² timely filed answers deny, that Pneu Electric, Inc. (Pneu Electric) and Nan Ya Plastics Corporation, America (Nan Ya), violated Sections 8(a)(1) and (3) of the National Labor Relations Act, (the Act).

On the basis of the entire record, including the demeanor of the witnesses, and after consideration of the posthearing briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Pneu Electric, a corporation, with an office and place of business in Lafayette, Louisiana, and a jobsite at Nan Ya's plant in Batchelor, Louisiana, is engaged in the business of electrical contracting. In the 12-month period preceding November 30, 1996, Pneu Electric purchased and received at its Louisiana jobsites goods valued in excess of \$50,000 directly from points outside the State of Louisiana.

Respondent Nan Ya, a corporation with an office and manufacturing facility in Batchelor, Louisiana, is engaged in the manufacture of plastic film. During the 12-month period ending November 30, 1996, Nan Ya purchased and received goods at that facility valued in excess of \$50,000 directly from points outside the State of Louisiana.

Both Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

In late 1995, Nan Ya commenced a project to double the size of its plant in Batchelor, Louisiana. One of the contractors retained was Pneu Electric, which received five contracts over the term of the project, including the contracts for the lighting of

the new plant and for the power plant. Pneu Electric began work at the Nan Ya site in the spring of 1996 and continued to perform some work there until December. Pneu Electric doubled its normal work force, to over 100, during the summer, in order to perform the Nan Ya work. Pneu Electric also had jobsites in Houma, Louisiana, and elsewhere during this period. Neither Pneu Electric nor Nan Ya recognized any unions as representatives of their employees.

Pneu Electric's owner and chief executive officer is Lester Colomb; Freddie Zeringue was the field manager and Tony Patin was the shop/field coordinator at Nan Ya at all relevant times. Colomb, Zeringue, and Patin are admitted to have been supervisors and agents on Pneu Electric's behalf. Tim Benoit and Mark Miller were Pneu Electric's foremen on the Nan Ya site; their supervisory and agency status is disputed, as discussed infra.

Paul Bergeron is Nan Ya's safety manager and coordinator with its contractors. He is admitted to be Nan Ya's supervisor and agent but his alleged status as Pneu Electric's agent is denied.

B. Status of Benoit and Miller

Tim Benoit was Pneu Electric's foreman on the lighting project, reporting to Zeringue. He kept the time for Pneu Electric employees, assigned and checked on the work of his crew of about 12 electricians and helpers and seldom performed work with the tools of the electrical craft. He had keys to the trailer, gang boxes, and a company vehicle and carried a two-way radio to communicate with Zeringue and Mark Miller. Benoit was listed by Zeringue, along with himself, as the Pneu Electric supervisors on the contractor's entrance permit completed weekly. He, along with Colomb and Zeringue, were the persons Bergeron contacted when there was a problem on the site. Colomb testified, without contradiction, that Benoit could not hire, fire, or suspend employees but could only relate problems to Zeringue. However, on at least one occasion, he verbally reprimanded an employee for failing to get to work on time. When Zeringue was transferred to another site (some time around late July or early August), Benoit replaced him as superintendent.²

Mark Miller's responsibilities were similar to Benoit's. He assigned work to his 8- to 10-employee crew working on high voltage equipment, made sure they had what they needed to perform the work, had keys to the trailer and gang boxes, and drove the company van, carrying employees to and from Baton Rouge. His pay was \$1 an hour or more higher than that paid journeymen electricians. At one point, Simon Lopez observed him tell Zeringue that a helper, identified only by the nickname "Weed," was "not worth anything," following which "Weed" was terminated.

Zeringue, Miller, and Benoit carried two-way radios so they could communicate with one another. They wore tee shirts with the company name on them; other Pneu Electric employees were not given such shirts. Miller's and Benoit's names also

¹ All dates are in 1996 unless otherwise indicated.

² While employee Walter Porche testified that Benoit had allowed him a day off, his cross-examination testimony makes clear that Benoit had already replaced Zeringue as superintendent by that time.

appeared on a blackboard in the job trailer above a listing of the employees on their crews.³

Based on the foregoing, I am satisfied that Benoit and Miller were statutory supervisors who responsibly assign and direct the work of the crews assigned to them, exercising discretion and independent judgment and authority. I note that Pneu-Elect had 100 or more employees working in various locations throughout a large plant construction site; unless Benoit and Miller were supervisors, the only supervisor regularly on the site would have been Zeringue and thus most of these employees would have been performing their work without any regular supervision. See *DST Industries*, 310 NLRB 957 (1993).

Even if I were not to find them supervisors, the facts compel a conclusion that Benoit and Miller were Pneu-Elect's agents, under the doctrine of apparent authority. Pneu-Elect held them out as foremen, so listed them over the names of their crew members on the office bulletin board, delegated them to assign or at least transmit work assignments, gave them equipment to communicate with the superintendent and with one another, dressed them in distinctive clothing and entrusted them with the keys to the office, tool boxes, and vehicles. Moreover, the anti-union statements attributed to them echoed (and amplified) the sentiments of the admitted supervisor, Zeringue. The employees could therefore reasonably believe that, in speaking about and against their organizational efforts, Benoit and Miller were reflecting company policy and were speaking and acting for Pneu-Elect's management. *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997); and *Star Color Plate Service*, 279 NLRB 576 (1986).

C. No-Solicitation Rules

Nan Ya maintains employee rules, including the following prohibition:

Doing personal work, or making unauthorized solicitations, or engaging in non-job related activity without permission during working hours.

While Nan Ya's rules are purportedly given to its contractors, there is no evidence that anyone from Pneu Electric instructed any of its employees as to Nan Ya's rules.⁴

³ Neither Benoit nor Miller testified. Miller is no longer in Pneu Electric's employ and Colomb did not know where he was. No similar explanation was offered for the failure to call Benoit who was its job superintendent at Nan Ya after Zeringue transferred to another site. I find that Pneu Electric has failed to call Benoit, a witness who might reasonably be assumed to be favorably disposed to it, or to explain his absence. His absence therefore warrants that I draw adverse inferences with respect to factual questions on which he is likely to have knowledge and infer that, in such cases, had he been called, he would have testified adversely to Respondent Pneu Electric. *Jim Walter Resources*, 324 NLRB 1231 (1997).

⁴ Nan Ya's rules also prohibit "Participation in or organizing an unauthorized work stoppage" and "Violation of Employee Secrecy Agreement." These rules, and the signs prohibiting solicitation on the Nan Ya site, are presumptively unlawful and invalid. An employer cannot prohibit solicitations in nonwork areas on nonwork time absent special circumstances, require its employees to secure management's permission before engaging in a work stoppage (and who else could give such authorization to Nan Ya's unrepresented employees), or

Nan Ya has several different signs posted at the plant. At the main gate, there is a sign stating "No Solicitation Allowed." Also posted at the front gate, by the guard shack, is a sign setting out the plant rules. Included among those is, "LOITERING AND LOAFING ARE PROHIBITED—YOU ARE HERE FOR A SPECIFIC REASON—STICK TO IT." At the back gate, which is the gate used by the contractors' employees when they enter the site, is a notice that vehicles entering or leaving the site are subject to search. After the discharges of Zylks and Aycock, discussed infra, Bergeron allegedly *replaced* a sticker stating, "NO SOLICITATION ON NAN YA PROPERTY" on the sign at the rear gate. He believed it had been there when they began work; they had not seen it. He claimed to have discovered that it was not there after their terminations.⁵

To Bergeron, "solicitation" was recruiting or seeking funds from other employees for an organization, union, or another employer. He was unaware of any restriction on employee conversations while working and he conceded that Nan Ya's rule would not be violated by one employee asking another to go to a social event or out on a date while they were working, so long as the work was not interrupted. Even asking another employee to join a union, he said, would be okay if the work was not interrupted "[a]s long as it was . . . approved by management and they were aware of it."

Pneu Electric has no rules regarding solicitation. Colomb stated that it has a simple policy, employees are supposed to be working when on worktime.⁶

D. The Hiring, Assignment, and Terminations of Zylks and Aycock

On June 13, Clifford Zylks and Andras "Joe" Aycock responded to Pneu Electric's advertisements for electricians in a Baton Rouge newspaper by calling the Company's offices. They were directed to apply at the Nan Ya site. Aycock went to the site on June 14, where he was directed from the guard station to the back gate and Pneu Electric's trailer. He met first with Benoit, who told him that they had run out of application forms. Benoit then got Zeringue to talk with him. After a discussion about Aycock's experience, Zeringue asked if he was interested in a foreman's job on the night shift. Aycock declined and was told to report for work, as an employee, on Monday morning, June 17. Zylks called Zeringue at the site;

prohibit employees from discussing such matters as their wages. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). No complaint allegations, however, refer to these prohibitions. I note their existence only as it relates to the actions taken by Bergeron and to Nan Ya's hostility to the exercise of statutory rights.

⁵ Johnny Byrd testified credibly and without contradiction that he observed Bergeron post no-solicitation signs at the gate and the guard shack after he and two other employees, Lopez and Porche, announced their union affiliation, in early August, more than a month after the discharges of Zylks and Aycock.

⁶ On occasion, Tim Benoit would collect money from the employees, while they were working, so that he could go off the site and buy their lunches. I would not find such activity by a supervisor to be a solicitation comparable to solicitations of union authorizations or memberships.

they discussed the wages and he was told to come in on Monday, June 17, to fill out the paperwork and start work.

When Zeringue told Zylks and Aycock that they were hired, he had no inkling that they were affiliated with the Union. As soon as they had completed the application forms on June 17, Zylks and Aycock donned union organizer buttons⁷ and announced their intention to engage in organizing activities.

Zylks had been seen as he entered the site on June 17, by Mark Miller who knew him to be a union supporter. When he saw Zylks and Aycock, Miller told employee Simon Lopez,⁸ "Here comes union trash. They're here to start trouble." After Zylks and Aycock came out of Pneu Electric's trailer, Lopez and Miller went in. Lopez heard Miller ask Zeringue whether the latter had hired Zylks and Aycock. When Zeringue said that he had, Miller told him that they were "union guys." Zeringue purportedly said that he wished Miller "had told him that" or "wished he knew that or he never would have hired them."⁹ Miller said that he did not want them on his crew and that he could just put them by themselves and give them "dirt work."

Zylks and Aycock received their assignment, to work on the transformer in the power substation under Miller, after they announced that they were union organizers. This work, which was part of one Pneu Electric contract with Nan Ya, was somewhat isolated from the other employees. However, because not everything needed to perform that work was present where the work was to be done, it required that Zylks and Aycock move around the plant to assemble necessary materials. That assignment was also contrary to what Miller had told Lopez several days earlier, to the effect that new employees would begin working on June 17 and would be assigned to work with the other crews, pulling wire.¹⁰ There is no evidence to establish that the work on the power station was especially "dirty" or onerous.

At some point on June 17, Lopez was working with Miller when Zeringue came by. Miller asked him, "What's happening with the union guys?" Zeringue replied that he couldn't say or do anything, that he had spoken to the Nan Ya safety man who was going to run "him" off, and that the Nan Ya safety man

would be glad to do it because Nan Ya didn't want a union out on the job. At the end of the workday, as Lopez, Zeringue, Miller, and some helpers were walking toward the trailer, someone asked what was going to happen to the "union guys." Zeringue replied that he had talked to the Nan Ya officials who had advised him not to say or do anything, but that they were going to figure something out.¹¹

During the work day on June 17, someone dropped a ten-foot length of conduit from a height near Zylks and Aycock. Miller told Lopez about the incident and while they were talking, Zeringue approached them. Miller asked if Zeringue had heard about the incident. Zeringue said that it had probably been done by the elevator men who didn't like the union. Zeringue told them that he had advised Zylks and Aycock to take their union badges off. On the ride home that night, Miller told Lopez that he had "started to wait 30 minutes and throw another piece of conduit at them."

In what appears to have been this same conversation, Miller expressed additional animus toward Zylks and Aycock, indicating in extremely vulgar terms that the union supporters would not be allowed to commute to and from the jobsite in the company van and saying that he would defecate in their lunch boxes as he had done to others on other jobsites.

On the morning of June 18, Lopez and Miller were in the job trailer. Benoit came by and asked Miller if "he could find anybody on his crew they could get rid of . . . before they could get rid of the union guys" saying that, in "that way, it wouldn't look so bad." Miller said that it would not be a problem. Later that day, when Lopez and other members of his crew asked Benoit about rumors of a layoff, he told them not to worry, that they would only be making it look like a layoff was necessary in order to get rid of the union guys, and that they were needed on the job. Miller essentially repeated this to Lopez and other employees later that afternoon. On that same day, according to Lopez, an electrician and a helper were terminated.¹² On their ride home, Miller told Lopez that they had only been laid off so that it would not look so bad when the union guys were eliminated.

⁷ The buttons were about 2 inches in diameter and read, "IBEW UNION ORGANIZER."

⁸ Lopez was an employee hired about June 3. He had recently acquired union membership; his support for the Union was not known to management until he revealed it in August.

⁹ While I have generally credited Lopez' testimony, for reasons discussed *infra*, I credit Zeringue's denial in regard to this statement. I note that, unlike his other denials, his testimony that he did not tell anyone that he would have hired certain employees if he had known they were in the Union goes directly to refute the purported threat. Moreover, I deem it improbable that Zeringue would have made such a statement at that time since he was already aware that Zylks and Aycock were union members seeking to organize his work force.

¹⁰ Lopez testified credibly as to the conversations he heard or in which he participated. His testimony as to this conversation is also consistent with that of Zylks and Aycock and with the notes he made of these conversations shortly after they occurred. I do not credit Zeringue's testimony to the effect that he had discussed their working on the power substation on the first day they came to the site, before he was aware of their union roles. Their initial visits to the site were on different days.

¹¹ Other than as set forth above, I cannot find that the specific and especially damning nature of Lopez' testimony was rebutted or contradicted by Zeringue's denials that he had told any "employees that [he] was going to have Nan Ya's safety man, Mr. Bergeron, terminate employees who were members or supporters of the union," or that he "ever threaten[ed] to terminate employees who were members or supporters of the union." I note that it was not contended that Zeringue asked Bergeron to terminate union members or that he expressly threatened to discharge any employees. Thus, his denials do not respond directly to the statements attributed to him. Moreover, the statements attributed to Zeringue by Lopez are consistent with Zeringue's undisputed statement caught on tape by Porche, described below. I note that while Bergeron denied discussing Zylks and Aycock with Colomb, he did not deny having discussed them with Zeringue.

¹² I cannot determine, from the records in evidence, whether any employees were actually laid off that day. While the layoff of unaffiliated employees to provide justification for the layoff of those supporting a union is clearly violative of Sec. 8(a)(3), there is no complaint allegation concerning any such layoffs. See *Stark Electric*, 324 NLRB 1207 fn. 2 (1997).

Colomb came to the Nan Ya jobsite on June 18. While he was there, Zylks introduced himself as a union organizer and gave Colomb a letter from the Union confirming that both he and Aycock were acting in that capacity.

At one point, on what appears to be the morning of June 19, before Zylks and Aycock were terminated, Walter Porche, an electrician,¹³ told Zeringue of his concerns about the possibility of layoffs. Zeringue assured him that "I'm not going to lay nobody off Thursday . . . *The first ones to be gone is those union guys. . . . Simple as that. . . . Don't worry about nothing. . . . We got a lot of work that needs to be done.*" At the conclusion of this taped and undisputed conversation, Porche told Zeringue that "[t]hey started some shit with me yesterday . . . started messing with me." Zeringue replied, "Tell him man, you do that shit on your own fucking time. . . I'm fixing to tell him over there if they start soliciting after break or anything I'm going to tell them you're on my time mother fucker." There is nothing in the record to indicate that Porche had told Zeringue whether Zylks and Aycock had "messed" with him while any of them were working or that they had interfered with his work.

Zylks and Aycock engaged in extensive union activities while at the Nan Ya site. They talked with other employees about what they perceived to be the benefits of union membership and they asked those employees if they had any questions about unions. They did this while they were at their work stations and as they moved about the plant looking for the materials and equipment needed on their job, talking to employees of Pneu Electric, Nan Ya, and other contractors while those employees were also working. They also distributed union literature, pencils, and stickers but only, they claimed, during breaks and before and after work.¹⁴ They denied having been told of any no-solicitation rules and they denied that their conversations interrupted either their own or any other employees' work.

Other than the union activity related by Porche to Zeringue, only one employee claimed to have been disturbed by them. John Simms testified that Zylks had talked to him "for not more than a couple of minutes," before dinner. That conversation consisted of Zylks asking Simms what he thought about the union and Simms replying that he did not think that unions were strong enough in the south. Simms then walked away. There is no evidence that Simms reported this brief conversation to any supervisor before Zylks and Aycock were terminated.

Bergeron testified that he had received a number of reports from Nan Ya employees and from employees of another contractor that Zylks and Aycock were "soliciting for the union during working hours or working time." He claimed to have

been told that they were stopping employees while they were working, talking to them about joining the union and handing them brochures. He made no record of these reports, although it was his practice to do so. He could only recall the name of one employee, Jay Richards, who had allegedly made such a report.¹⁵

Zeringue claimed that reports by Bergeron of union solicitations by Zylks and Aycock, as well as his own observations of their actions, prompted him to warn them, more than once, that they needed to stay on their work station and get their work done. He gave no details of the alleged reports or of his alleged admonitions to them. Bergeron, moreover, did not claim to have reported the union activities to Zeringue until immediately before he ordered them from the plant, discussed below. I cannot credit Zeringue's uncorroborated and generalized testimony that Bergeron reported their alleged solicitation activity to him, that he saw them so engaged or that he had warned them about those activities. Zylks and Aycock both credibly denied that, prior to the ultimate conversation with Bergeron, anyone had spoken to them about their alleged solicitations or informed them about no-solicitation rules at that site.

On the morning of June 19, Zylks and Aycock went to the job trailer where, in Zeringue's presence, Zylks used the telephone to call his union representative in order to get the number for OSHA, in order to report the conduit incident and other safety concerns. Zeringue sent them back to work with the assurance that the safety man would be brought to them.¹⁶

Shortly thereafter, Bergeron approached Zylks and Aycock at their worksite. He introduced himself as the safety manager and told them, "If y'all organizing *on this plant site* I'm going to ask y'all to leave. If I hear any word of this going on out here y'all will leave this plant site." They told him that they had been trying to get to speak to him for 3 days (about the perceived safety issues) and that they were "in an organizing effort." Bergeron asked them, "And you're organizing here *on this site?*" They said they were employees of Pneu Electric and acknowledged that they were engaged in an effort to "organize the employees and the company." Bergeron told them, "OK, *but you're not going to do it here on this site. . . [t]here's going to be no organizing on this site*, if you want to organize and recruit you do it outside the gate *not here on this premises.*" They insisted that they were employees and were again told, "it don't matter. I'm not going to have any organizing here." He said that he was "kind of like over Freddie [Zeringue] and [could] have them come and go, and *there will be no organizing on this site.*" (Emphasis added.)

Zylks and Aycock told Bergeron that they were members of Local 995. When they assured him that they would continue to organize, he said, "Well, I'm going to have to ask y'all to leave now." They pressed him on whether he was firing them and he confirmed that he was.

Zylks and Aycock then told Miller and Zeringue that Bergeron had just fired them. Zeringue asked them if they

¹³ Porche was a union member, although that fact was not known to Pneu Electric.

¹⁴ Pneu Electric offered no evidence, and made no contention, that Zylks and Aycock distributed union literature or solicited employees to sign authorization or membership application cards during working hours or that any employees had reported that they had done so. On June 19, the morning of their discharge, Zylks gave a union handbill to Zeringue as the latter entered the gate, before work. Zeringue wadded it up and threw it away, stating, "We're nonunion, we're not interested in it. I'm nonunion all the way."

¹⁵ No one called Richards as a witness.

¹⁶ Further discussion of the safety complaint issue is unnecessary as General Counsel does not appear to argue that either respondent was motivated to terminate them by this protected activity.

couldn't just cease their organizing and told them, "*You can't do this on site.*" When he accused them of disrupting his crew, they insisted that they had been working. Bergeron repeated, in Zeringue's presence, that he was "not having organizing *on site*" and Zeringue again asserted that they had stopped others from working. When they insisted that they had been working, Bergeron stated, "Freddie [Zeringue], it doesn't matter, done did and over with. Y'all need to leave."

Zylks and Aycock then questioned Zeringue as to whether he agreed with their being discharged. Zeringue reiterated that they had been interrupting his employees, "interrupted their hands . . . stopping people talking to them." They again denied that they had stopped anyone from working and said that they could not control others coming over to them to talk. As they walked out of the site, they called to other employees, telling them that they had been fired for organizing and inviting them to come to the union hall after work.

Lopez was walking through the gate when Zylks and Aycock left and heard them shout that they had been fired. He related this to Benoit who replied, "Yes, the safety man fired them . . . Cliffie [Zylks] wanted to talk to our OSHA guy and the safety man got mad at him and fired him."

Later that day, Colomb called Zylks at home. He told Zylks that they were not fired, that a Nan Ya representative could ask them to leave the site but not discharge them and that he was continuing to pay them, at least until he heard their side of the story and got matters straight. While, he said, he could not let them back in the gate, Colomb arranged to meet with them at a gas station near the site on the following morning. Zylks told Colomb that they wanted to come back to work and Colomb said he thought that he could get them back in the plant.

Zylks, Aycock and Colomb met as scheduled on June 20. Zylks described the conversation with Bergeron, insisting, contrary to Colomb's understanding, that Bergeron had fired them for organizing "on the site" not for organizing "during work time." Colomb asked, "if I can get y'all back in the plant . . . will y'all agree not to organize during work time?" Zylks insisted, "I'm going to continue to organize . . . while I'm working . . . *I'm not going to stop anybody from working.*" Colomb claimed, "we got documented cases that during work time y'all did go talk to people about organizing." Zylks repeated:

As long as I'm working I'm going to talk. I'm not stopping anybody else from working, if I go over there to pick up some pipe or go get some wire or whatever and the guys are in there terminating and I'm cutting wire I'm working . . . I'm not stopping nobody from working.

Zylks refused to restrict his organizing activities to breaks and lunches; Aycock took the same position, expressly stating, "I will continue to organize too but I will not stop anyone from working."

Colomb told them that he would talk to Nan Ya and they argued about whether they could be prohibited from organizing during work time if they did not interrupt their work or the work of others, whether Bergeron had forbidden them from organizing on work time or on the site and whether he had told them they were fired. They continued to assure Colomb that, while they would not stop their organizing during work time,

they would not interfere with production. He assured them that he would talk to Nan Ya about returning them to the site.

Zylks called Colomb the following morning. Colomb related that he had talked to the Nan Ya people and that, "as long as y'all . . . won't agree to stop . . . organizing . . . labor organization activity during work time. . . I can't . . . put y'all back to work there." Zylks repeated that they would continue to organize and Colomb concluded by saying that he didn't have anything else and that there was nothing he could do for them.¹⁷ Zylks and Aycock had no further contact with Pneu Electric.

On the same day that Zylks and Aycock were terminated, Zeringue asked Johnny Byrd, an employee whose union affiliation was unknown to Zeringue, whether another employee, George Hughes, was a union man. Although he knew that Hughes, like himself, was union, Byrd professed ignorance.¹⁸

E. Refusals to Consider and/or Hire

Pneu Electric advertises for electricians even when it has no immediate need for them, building a pool upon whom it can call as the need arises. It has no express policy as to how long it will retain applications but keeps them for at least a year.

Hiring is done at both the office in Lafayette, Louisiana and at the jobsites. Applicants are expected to complete a formal application; sometimes they are hired first on the basis of an interview, and, as in the cases of Clifford Zylks and Joe Aycock, complete the application forms before actually beginning work.

On June 24, Russell Anderson, a journeyman electrician and union member, called Pneu Electric's office and inquired about employment. He was told that he could apply either at the office or at the Nan Ya jobsite, and he was instructed to ask for Zeringue if he chose to go to the latter. He then called Zeringue and asked if Pneu Electric was hiring. Zeringue asked if he was a journeymen and whether he had an OSHA card. When Anderson replied affirmatively, Zeringue told him, "I pretty much need people right now . . . [i]f you're ready to go to work I need people bad, got a lot working 12 sevens [presumably meaning seven days of 12 hour shifts] right now until the end of this week for sure this weekend." Anderson said he would be there the next day and Zeringue directed him to come around to the back of the plant.¹⁹

Mid-morning on June 25, Kendrick (Ricky) Russell, Donald Longuepee and Roland Goetzman went to the gate at the Nan Ya site to apply to Pneu Electric. Russell was the Union's business manager and organizer; Goetzman and Longuepee were electrician-union members on the out-of-work list. They all wore the union organizer buttons, a fact commented upon by the guard. After a brief wait, Zeringue came to the gate. Russell introduced himself as the Union's business manager and stated that they wanted to apply for work. Zeringue said that he would check to see if he had any applications in the trailer and, when asked if Pneu Electric was hiring, told them, "I'm kinda caught up at the moment but I may be hiring . . . we're fixing to cut

¹⁷ Zylks captured all of the foregoing conversations on tape. They are undisputed.

¹⁸ Byrd acknowledged that this interrogation was unaccompanied by any explicit threat. His testimony stands uncontradicted.

¹⁹ Anderson captured this conversation on tape; it is undisputed.

back some guys here” as soon as the power station was energized. In referring to the power station, Zeringue commented that that was where Russell’s “two guys . . . Aycock and Clifford” [Zylks] had been working. Zeringue then said, “Fixing to cut back today for sure, tomorrow once we energize it.”

Shortly thereafter, Colomb came to the gate where he met Russell and the others. He told them, “We’re laying off, we don’t have any positions or nothing right here now . . . we laid off some people yesterday and we are continuing laying off all the way through Thursday.” He refused to give them applications, saying that he didn’t have any, but he invited them to go to the office in Lafayette where, he said, they could apply. In response to a question by Russell, Colomb said that they were through with one contract with Nan Ya and would complete the rest that week.

Lopez was with Zeringue and Miller when Colomb came walking back into the plant. Colomb said that he had told the “union guys” at the gate that they were not hiring and were, in fact laying off. He said that, if they were still out there, Miller should tell them the same thing. Miller suggested they should offer them jobs at \$6.50 per hour; Zeringue suggested that they should meet the union guys at a local restaurant and “give them a thorough ass-whipping.”²⁰

Russell Anderson saw Ricky Russell, Longuee, and Goetzman go into the site ahead of him on June 25. Unlike them, someone claiming to work for Pneu Electric gave him an application. However, he was never offered a job.²¹

Ricky Russell returned to the Nan Ya site on August 2 and again spoke with Zeringue. He told Zeringue that he had seen a Pneu Electric ad in the paper and was seeking work at that site. Zeringue replied that the company was advertising for employees at its Houma, Louisiana site, for which Russell could apply at Pneu Electric’s main office. Russell went to the Lafayette office on August 5, accompanied by Patrick Clary, a union member and organizer on the union’s staff. Both were wearing the union organizer buttons. They completed applications. Russell expressed an interest in work at the Nan Ya site but they did not limit their applications to work there.²² His application revealed that he had been the Union’s business manager and organizer since 1986 and had last worked in the trade in that year. Clary’s indicated that his employment since June 1994 had been as an organizer and that he had worked as an electrician on only three short jobs, totaling less than a month, since then. Neither Russell nor Clary were offered employment, either at Nan Ya or at Houma. Colomb could not say why they were not hired but, when he looked at their applications several weeks after they had been submitted, he concluded that the

absence of recent or significant work experience in the craft would have precluded their being hired.

With one exception, the record does not establish that any electricians were hired by Pneu Electric to work at the Nan Ya site after the June 19 terminations of Zylks and Aycock. That one exception is Bill Spreyer who was hired in mid-July at \$10 per hour. He worked at two other sites and was brought to Nan Ya, where he was made a foreman, at \$14 per hour.²³ At least two electricians were hired in August to work at the Houma site

F. Attempted Transfer and Discharge of Byrd, Lopez, and Porche

During July and August, Pneu Electric had jobs running both at the Nan Ya site and in Houma, Louisiana. The latter site was a couple of hours from the Nan Ya site. In late July, four or five electricians were transferred to Houma from the Nan Ya job; they were not individuals known to be union members or supporters. At about the same time, Colomb spoke with Lopez, Byrd, and possibly others, telling them that the Nan Ya job was winding down. He asked if they would go to Houma to help out for a week or two before returning to Nan Ya. No one voiced any objections.

On the morning of August 8, Pneu Electric received notice from the Union that Lopez and Walter Porche were union members engaged in organizing activities. At the same time, those two employees and Johnny Byrd donned their union insignia. While they claimed that they were the only employees wearing union insignia on the site at that time, Colomb credibly testified that he observed George Hughes and at least two others, in addition to them, openly wearing union insignia as he made an inspection of the site.

After they made their union affiliation known, Byrd, Lopez and Porche were summoned to the job trailer to meet with Colomb. Colomb told them that he wanted them to leave the Nan Ya job and go to Houma. At that site, he told them, they would be paid a per diem for food and provided with lodging. They were instructed to get their tools and wait at the trailer. They asked what would happen if they refused to go and were told that they would be terminated. They refused repeated offers to go to the Houma job, on the advice of their business agent, and were kept at the trailer until they were sent home.²⁴ After they

²³ Pneu Electric’s records introduced by both the General Counsel and Pneu Electric are ambiguous and not self-contained. It appears that Pneu Electric hired electricians, helpers and others to work at other sites after June 25 and, from time to time, transferred earlier-hired employees to the Nan Ya site.

²⁴ In the course of the meeting, Colomb allegedly said that he wanted to transfer them to Houma because, according to Porche, “Nan Ya didn’t want any union personnel in that plant and his contract didn’t allow it.” As Byrd recalls it, from both this meeting and a subsequent telephone conversation with Colomb, Colomb said that “his hands were tied . . . he had to get us off that job.” While Colomb did not directly contradict this testimony, he did testify that these employees were selected because their skills were needed at Houma and he denied that their display of union affiliation factored into his decision. Lopez did not attribute statements similar to those related by Porche and Byrd, to Colomb. To the contrary, the notes he made of this conversation provide support to Colomb’s testimony. In those notes (which accurately support Lopez’ testimony concerning other conversations), Lopez

²⁰ All of the foregoing conversations are either drawn from undisputed transcripts of recorded conversations or are otherwise uncontradicted.

²¹ Russell Anderson, who had not identified himself as a union member or supporter when he applied, was not alleged to have been discriminatorily denied hire or consideration for hire.

²² By completing applications, and indicating a desire to go to work for Pneu Electric after being told there were no jobs at Nan Ya, I find that they implicitly sought work where ever Pneu Electric might have it.

left the site, Colomb called them to repeat his efforts to convince them to accept transfers to Houma.

After Byrd, Lopez and Porche were terminated, no one else was transferred from Nan Ya to Houma; neither was anyone hired to replace them. Colomb explained that, with them gone, the crew at Nan Ya was “pretty well tighten[ed] up.” Two other electricians were hired to work at Houma.

G. Analysis

1. 8(a)(1) violations attributable to Pneu-Elect

(a) *Mark Miller*—The complaint alleges that Miller threatened employees with loss of benefits if they supported the Union, threatened to isolate and give such employees more onerous work and threatened them with termination. The credited evidence reflects that Miller, whom I have found to be a supervisor and/or agent, stated, in the presence of employees, that he would not want the “union guys” on his crew, that he could just put them to work by themselves and give them “dirt work.” He also spoke about using a subterfuge to get rid of them and of denying them the convenience of commuting with other employees in the Company vehicle. Each of such statements tends to interfere with, restrain and coerce employees in the exercise of statutory rights and I find that by Mark Miller’s having uttered them, Respondent Pneu-Elect has violated Section 8(a)(1) of the Act.²⁵ See, *Anderson Co.*, 305 NLRB 878, 878–879 (1991).

(b) *Tim Benoit*—The complaint alleges that Benoit told employees that others had been laid off in order to terminate union supporters and that two employees had been terminated because one of them had called OSHA. Such statements, which clearly threaten discharge for engaging in union and other protected activity, were credibly attributed to Benoit by Lopez. I find that by these statements, Pneu Electric has further violated Section 8(a)(1).

(c) *Freddie Zeringue*—The complaint alleges that Zeringue stated, in the presence of employees, that he would not have hired certain employees if he had known they were union supporters, threatened their discharge and interrogated an employee about the union sympathies of other employees. The evidence which I have credited, some of which is uncontroverted, establishes that Zeringue, in employee Lopez’ presence, said that he had spoken to the Nan Ya safety man (i.e., Bergeron) who was going to “run off” those who were union supporters, and told an employee that the union supporters would be the first ones gone in the event of a layoff. These are plainly coercive threats, implying that union support was inconsistent with continued employment, and violative of Section

wrote that when he asked Colomb if the transfers “had anything to do with us being members of the union, he (Colomb) said no, he just needed people of our caliber and quality at Homa [sic].” I find that Colomb made no reference to their displays of union support or to Nan Ya’s alleged prohibition of union supporters on its premises in these discussions.

²⁵ The record also reflects that Miller impliedly threatened to harm Zylks and Aycock by dropping conduit on them and to engage in other offensive conduct with respect to them. These additional statements are not alleged as violative and I make no finding of unfair labor practices with respect to them.

8(a)(1). *Quality Control Electric*, 323 NLRB 238 (1997). Similarly coercive is Zeringue’s question to Byrd concerning the union sympathies of another employee, Hughes. While the questioning of a *known* union supporter may, under appropriate circumstances, be noncoercive, the questioning of any employee about the union activities of another, where neither are open union adherents, is without legitimate justification and always coercive. It is particularly so in the context of this case wherein there were numerous threats and the two most open union adherents were (as I find, *infra*) discriminatorily discharged. *Avery Leasing*, 315 NLRB 576, 580 (1994).

2. 8(a)(1) and (3) violations attributable to Nan Ya

The complaint alleges that Nan Ya violated Section 8(a)(1) and (3) of the Act by Bergeron’s admonition to Zylks and Aycock that they could not organize on the Nan Ya site and by ordering them to leave the site because they did so. It is undisputed that Bergeron repeatedly told them that they could not engage in organizational activities “on this plant site,” “on this site,” and “on [these] premises.” He also told that that he would have to ask them to leave if they persisted in doing so and, when they insisted that they would continue their union activity, ordered them off the site. At no time did he tell them that they could solicit on their own time but not solicit during working time. Neither did he tell them that they were terminated because they had engaged in any impermissible solicitations. By Bergeron’s actions, Nan Ya has violated Section 8(a)(1) and (3).²⁶

An employer cannot prohibit all union activity on its premises. It cannot prohibit employees from engaging in union-related conversations while permitting them to engage in other nonwork related conversations during working time. It cannot tell them not to talk about “union stuff.” *Louis A. Weiss Memorial Hospital*, 324 NLRB 946 (1997); and *Emergency One, Inc.*, 306 NLRB 800 (1992). This is precisely what Bergeron did. His statements to Zylks and Aycock were not confined to prohibiting impermissible solicitations but were expressly and repeatedly directed at any and all union organizing on the site. Employees could talk to other employees about anything else while they worked; they could ask others to participate in social activities with them. They could therefore discuss their views on unions.

Moreover, this right extends to the employees of contractors regularly working on Nan Ya’s site; they are invitees, not strangers or outsiders, and entitled to the same organizational rights as Nan Ya’s employees. During the tenure of their employment by Pneu-Elect, Zylks and Aycock worked exclusively for Pneu-Elect at the Nan Ya site and had full employee rights. *Gayfers Department Store*, 324 NLRB 1246 (1997); and *Southern Services*, 300 NLRB 1154, 1155 (1990).

²⁶ While there is evidence that Zeringue told employees of his conversations with Bergeron to the effect that Bergeron was going to eliminate the union sympathizers, there is no direct evidence that Zeringue or anyone else from Pneu Electric asked or authorized him to do so. I find that there is insufficient evidence to establish that Bergeron was acting as Pneu Electric’s agent with regard to his warnings to, and terminations of Zylks and Aycock. Moreover, a finding of such agency would add nothing of consequence to the remedy here.

Respondent Nan Ya contends that Zylks and Aycock were fired for engaging in impermissible union solicitations during working time. Even if I were to find that this was Nan Ya's honest belief and motivation (contrary to Bergeron's statements when he fired them), this defense invokes application of the principles of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) and *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952):

Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *Keco Industries*, 306 NLRB 15, 17 (1992).

In this case, Bergeron claimed that he had received reports from employees of "solicitations" engaged in by Zylks and Aycock during working time. He gave no specifics, named only one employee, who was not called to testify, and he made no record of such reports, contrary to his regular practice. The only employees who testified concerning the union activities of Zylks and Aycock did not attribute any impermissible solicitations to them or claim that they had reported any such activity to Bergeron.

Zylks and Aycock, on the other hand, credibly testified that, while they engaged in extensive discussions of the union while they and the employees to whom they spoke were working, they did not stop their work or interfere with the work of any others. They did not seek to have those other employees sign any union authorizations or pay them any union dues. Moreover, their distributions were limited to nonwork times. I credit their testimony. The General Counsel has shown that they were engaged only in permissible union activities. Respondent Nan Ya has not rebutted that by establishing that they had engaged in any misconduct.

I therefore find that Respondent Nan Ya has violated Section 8(a)(1) and (3) by attempting to prohibit all union activity on its plant site and by discharging Zylks and Aycock because they were engaging in organizing activity on that site.

3. 8(a)(3) conduct attributed to Pneu Electric

(a) *Zylks and Aycock*—The complaint alleges that Respondent Pneu Electric isolated Zylks and Aycock and assigned them to more onerous tasks and then discriminatorily discharged them because they were engaged in union activities.

There is evidence that, before Zylks and Aycock were hired, it was anticipated that new hires would go on to the crew that was pulling wire. There is also evidence that their supervisor, Miller, had stated that he would isolate the union supporters and assign them more onerous work. When they began to work, Zylks and Aycock were assigned to the power station. While this work was somewhat isolated; it did permit them to move around the plant, and there is no evidence that this work was dirtier or more onerous than any other work to which they could have been assigned. It was, moreover, work to which Pneu Electric had to assign some employees. Moreover, they were assigned to this work by Zeringue, not by Miller.

While the issue is less than crystal clear, I find that General Counsel has failed to establish that they were assigned to isolated and more onerous work because of their union activities.

The analytical mode applicable to Nan Ya's termination of Zylks and Aycock is also applicable to Pneu Electric's actions. While Pneu Electric asserts that they were discharged for violating the no solicitation rules, the evidence indicates that both Zeringue and Colomb told them that they could not engage in organizing on the Nan Ya site. And, while Zeringue also told them that they had been interfering with the work of others, Respondent adduced no evidence to contradict their testimony that they had not done so. Moreover, it does not appear that Pneu Electric had any no solicitation rules or that its employees were ever apprised of any valid rule imposed by Nan Ya. Thus, even if Zeringue and Colomb had an honest good-faith belief that they had engaged in unprotected union activity, the evidence on this record establishes that they were discharged for engaging in protected, not impermissible, union activity. Accordingly, I find that Respondent Pneu Electric has violated Section 8(a)(3) and (1) by its discharges of Zylks and Aycock.

(b) *Refusal to consider and/or hire*—Job applicants are employees within the meaning of Section 2(3) of the Act who may not be denied either consideration for employment or hire because of their union affiliation or even because of their intention to engage in union organizing once hired. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185, 187–188 (1941); *NLRB v. Town & Country Electric*, 513 U.S. 1125 (1995); *D.S.E. Concrete Forms, Inc.*, 303 NLRB 890, 896 (1991), enf. mem. 21 F.3d 1109 (5th Cir. 1994). The analytical mode for determining whether the refusal to consider applicants for hire was legal is that defined by *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 3393 (1983). If there is substantial evidence that the applicant's union affiliation was a motivating factor in the refusal to consider them for hire, the employer's actions are unlawful unless the record further establishes that the employer would have taken the same action even in the absence of the applicants' union affiliation.

In the instant case, known union adherents, Russell, Longuepee, and Goetzman, sought to apply for employment by Pneu Electric at the Nan Ya site on June 25. They did this after another individual, Anderson, whose union affiliation was not known, had been told that employees were being eagerly sought for immediate employment. They were misled about the hiring and layoff situation and about the availability of applications. They were denied applications, ostensibly because there were none available, while Anderson was provided with one.

However, the record establishes that notwithstanding Zeringue's acknowledgment that employees were being sought for immediate employment, Pneu Electric hired no more employees for the Nan Ya site and had hired none since June 19. While this raises some suspicion that Pneu Electric changed its hiring plans and decided to finish its contracts with its existing employees rather than offend Nan Ya by bringing on more union sympathizers, suspicion is not evidence. I cannot find that these three applicants were denied *employment* because of their union affiliation. I do find that they were treated disparately from applicants whose union sympathies were unknown, in that they were lied to about the employment situation and were denied applications.²⁷ They were effectively

were denied applications.²⁷ They were effectively denied consideration for any employment opportunities Pneu Electric might have. That disparate treatment violated Section 8(a)(3). *3E Co.*, 322 NLRB 1058 (1997), *enfd. mem.* 132 F.3d 1482 (D.C. Cir. 1997).

Russell, accompanied by Patrick Clary, a union member and organizer on the union's staff, applied at Pneu Electric's Lafayette office on August 5. Both were wearing the union organizer button. They were given applications. They received no job offers and the complaint alleges that Clary was discriminatorily denied consideration for hire.²⁸ As noted, Colomb was of the opinion that they did not have the work experience to qualify them for hire but had not asked anyone on his staff why they had not been hired.

Pneu Electric hired electricians after August 5, for Houma and possibly elsewhere. Neither the General Counsel nor the Respondent demonstrated how the qualifications of those electricians differed from Clary's.

On balance, I am unable to find that Respondent discriminatorily refused to hire Clary. The General Counsel has shown that he had union activity, Respondent knew of that activity and bore some animus toward those sympathetic to the Union. Respondent, on the other hand, has shown that Clary had meager qualifications and that it was willing to assign known union members to jobsites other than Nan Ya. Under *Wright Line*, Respondent has come forward with sufficient evidence to meet its burden to show that it would not have hired him even absent his union activities. Thus, the burden shifted back to the General Counsel who has not shown that individuals with equally meager credentials have been hired by Respondent or other evidence that he was treated disparately. I shall recommend that this allegation be dismissed.

(c) *Attempted transfers and terminations of Byrd, Lopez, and Porche*—The evidence establishes that before Byrd, Lopez, and Porche proclaimed their union affiliations, Colomb had spoken with employees, including some of them, about transferring and had actually transferred about five employees from Nan Ya to Houma. They expressed no objections at that time. When, however, he asked them to accept immediate transfers, they had just donned their union insignia and, on the advice of their business agent, rejected the request. Believing that it was management's function to tell employees where they will work, rather than the employees' function to dictate to management, they were terminated. I find no violations in this conduct.

Assuming that the General Counsel has adduced substantial evidence (in their display of union insignia and in the statements which Byrd and Porche attributed to Colomb) that their union activity was a motivating factor in the attempt to transfer them, I find that Pneu Electric has carried its burden of rebutting that evidence. Thus, I find that the transfer of employees, including at least some of these employees, was in the works

prior to their display of union insignia and, as described above, I have rejected the testimony of the employees concerning Colomb's alleged admission of discriminatory motivation. While the timing of the attempt to transfer them is suspicious, General Counsel has not shown that it is anything more than that. Further, the work at Nan Ya was winding down and the transfer of some employees was a reasonable way to reduce its work there. Given that, it was not unreasonable for Pneu Electric to terminate employees who refused to accept the transfer. I note that Colomb attempted, even after they left the site, to convince them to go to Houma on behalf of Pneu Electric and hired no one to replace them at Nan Ya.

CONCLUSIONS OF LAW

1. The Respondents, Pneu Electric, Inc. and Nan Ya Plastics Corporation, America, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local Union No. 995, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Pneu Electric violated Section 8(a)(1) of the Act:

(a) By interrogating employees about the union activities of other employees.

(b) By threatening employees with loss of benefits or privileges, threatening to isolate them and assign them more onerous work and threatening them with discharge in order to discourage them from engaging in union and other protected concerted activities.

4. Respondent Pneu Electric violated Section 8(a)(3) and (1) of the Act:

(a) By discharging Clifford Zylks and Andras Aycock on or about June 19, 1996, because of their union activities and in order to discourage employees from engaging in such activities.

(b) By treating union-affiliated applicants for employment differently from those whose union affiliations were unknown and by denying them applications for employment, thereby denying them consideration for employment because of their union membership, sympathies, or support.

5. Respondent Nan Ya violated Section 8(a)(1) of the Act by telling employees that they could not engage in union activities on plant premises.

6. Respondent Nan Ya violated Section 8(a)(3) and (1) of the Act by discharging or causing the discharges of Clifford Zylks and Andras Aycock because of their union activities and in order to discourage employees from engaging in union activities.

7. The Respondents have not, by any other conduct alleged in the complaint, violated the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Pneu Electric discriminatorily discharged Clifford Zylks and Andras Aycock on June 19, 1996, it must reinstate them to their former positions, or if those

²⁷ Given that Pneu Electric retained applications for at least a year, the denial of applications to these individuals was a meaningful act.

²⁸ The complaint alleged that Russell was denied both hire and consideration for hire following his June 25 application. It does not allege that Pneu Electric refused to either hire or consider him for hire with respect to his August 5 application.

positions no longer exist, to substantially equivalent positions and jointly and severally with Nan Ya make them whole for any loss of earning and other benefits they may have suffered by reason of the unlawful discrimination, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent Pneu-Elect violated Section 8(a)(1) and (3) of the Act by discriminatorily refusing to consider Russell, Longuee and Goetzman for employment, it must be ordered to consider them for hire and to make whole those individuals whom it would have hired for any job openings it had for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which Respondent Pneu-Elect subsequently would have assigned them. If it is shown in the compliance stage of this proceeding that Respondent Pneu-Elect, but for the discrimination, would have assigned any of these discriminatees to present jobs, it shall be required to hire them and place them in positions substantially equivalent to those for which they applied. In all instances, backpay shall be computed as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

Having found that Respondent Nan Ya discriminatorily discharged or caused Clifford Zylks and Andras Aycock to be discriminatorily discharged, it must notify Pneu Electric that it has no objection to their employment on its premises, with a copy to each of these employees, and it must jointly and severally with Pneu Electric make them whole for any loss of earnings and other benefits they may have suffered by reason of the unlawful discrimination, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra (1987).²⁹

The Respondents must also remove any references to their unlawful discharges from the files of Clifford Zylks and Andras Aycock and notify them in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

A. The Respondent, Pneu Electric, Inc., Lafayette, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about the union activities of other employees.

(b) Threatening employees with loss of benefits or privileges, threatening to isolate them and assign them more onerous work, and threatening them with discharge in order to discourage them from engaging in union and other protected concerted activities.

²⁹ The Respondents may litigate appropriate remedial issues at the compliance stage of this proceeding. *Stark Electric*, 324 NLRB 1207 fn. 3 (1997); *Dean General Contractors*, 285 NLRB 573 (1987).

³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Discharging or otherwise discriminating against employees because of their union activities and in order to discourage employees from engaging in such activities.

(d) Discriminatorily treating union-affiliated applicants for employment differently from those whose union affiliations were unknown and denying them applications and consideration for employment because of their union membership, sympathies, or support.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Clifford Zylks and Andras Aycock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with Nan Ya Plastics Corporation, make Clifford Zylks and Andras Aycock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Consider Kendrick Russell, Donald Longuee and Roland Goetzman for hire and make whole any of these discriminatees it would have hired for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which Respondent would have assigned them, in the manner set forth in the remedy section of this decision. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these individuals to present jobs, Respondent shall hire them and place them in positions substantially equivalent to those for which they applied.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Lafayette, Louisiana, and at its jobsite at the Nan Ya plant in Batchelor, Louisiana if it is still performing work there, copies of the attached notice marked "Appendix A."³¹ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent Pneu Electric's authorized representative, shall be posted by that Respondent immediately upon receipt and maintained for 60 consecutive

³¹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Pneu Electric to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Pneu Electric has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Pneu Electric at any time since June 17, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Pneu Electric has taken to comply.

B. The Respondent, Nan Ya Plastics Corporation, Batchelor, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they may not engage in union activities on plant premises.

(b) Discharging or causing the discharges of employees because of their union activities and in order to discourage employees from engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, inform Pneu Electric, Inc., with copies to Clifford Zylks and Andras Aycock, that Nan Ya has no objection to Pneu Electric employing Clifford Zylks and Andras Aycock to work on its projects.

(b) Jointly and severally with Pneu Electric make Clifford Zylks and Andras Aycock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Batchelor, Louisiana, copies of the attached notice marked "Appendix B."³² Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent Nan Ya's authorized representative, shall be posted by that Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Nan Ya to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Nan Ya has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Nan Ya at any time since June 17, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Nan Ya has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

³² See fn. 31, *supra*.